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Christine Sherwood

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Applicant : Steven E. Sadinsky Confirmation No. 8001
Application No. : 10/723,817
Filed : November 25, 2003
Title : TENSIONED PROTECTIVE FENCE WITH GATE AND METHOD OF
INSTALLATION THEREOF

Grp./Div. : 3679
Examiner : Michael P. Ferguson

Docket No. : 50833/G316

APPLICANT'S REPLY

Mail Stop Appeal Brief-Patents
Commissioner for Patents
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Post Office Box 7068
Pasadena, CA 91109-7068
March 8, 2006

Commissioner:

This reply brief is submitted in response the Examiner's Answer mailed on January 11, 2006. Claims 1-20, 24 and 25 are the claims on appeal and are included in Appendix A, attached hereto.

REMARKS

A. The Examiner improperly rejected claim 18 as being anticipated by Rasso (U.S. Patent No. 2,384,338).

The Examiner rejected independent claim 18 under 35 U.S.C. 102(b) as being anticipated by Rasso (U.S. Patent No. 2,384,338). Claim 18 reads (underlining provided for emphasis): "A gate pole comprising: a lower end; an insert that is received within the lower end of the fence pole; and a pin that is fixedly attached to the insert, the pin having a diameter smaller than that

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on the pole and a portion that protrudes from the lower end of the fence pole; wherein the pin is adapted to be inserted into a drilled socket in a pool deck."

In rejecting claim 18, the Examiner notes that Rasso discloses a pole comprising a pin, wherein the pin is capable of being inserted into a drilled socket in a pool deck. *Answer, p. 3, 13* (emphasis added). Appellant reiterates that the claim language reads "wherein the pin is adapted to be inserted into a drilled socket in a pool deck." As expressed below, Appellant maintains that "a pin adapted to" is patentably distinct from "a pin capable of."

According to *The American Heritage Dictionary of the English Language*, "adapted" means "to make suitable to or fit for a specific use or situation" (4th Ed., 2000) (emphasis added) (Appendix B). Another definition for "adapted" reads "changed in order to improve or made more fit for a particular purpose." *WordNet 2.0* (2003) (emphasis added) (Appendix B). As is clear from these definitions, "adapted" involves a proactive change to a device ("to make;" "changed;" "made") to customize a device for a particular purpose. Thus, a pin adapted to be inserted into a drilled socket in a pool deck has been designed specifically not only to merely fit into the drilled socket, but also to be closely secured by the drilled socket.

On the other hand, "capable" is defined as "having capacity or ability; efficient and able" or "having the ability required for a specific task or accomplishment; qualified." *The American Heritage Dictionary of the English Language* (4th Ed. 2000) (Appendix B). "Capable" refers to an existing characteristic of a device and encompasses a much broader range of devices than those encompassed by "adapted."

Appellant offers the following example to illustrate the difference in scope between "adapted to" and "capable of." A liquid adapted to be applied to the human body would be any liquid having biocompatibility with the human body, such as lotion, soap, or the like. In other words, any toxins in the liquid would have to be removed to make the liquid adapted to be applied to the human body. On the other hand, a liquid capable of being applied to the human body would include, for instance, hydrochloric acid, bleach, and other toxic substances in addition to lotion and soap. Clearly, there are many liquids capable of being applied to the human body, but far fewer that are adapted to be applied to the human body.

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Appellant maintains that Rasso does not disclose a gate pole wherein the pin is adapted to be inserted into a drilled socket in a pool deck. Rasso describes a driving point, the lower end of the driving point formed into a widened tapered chisel point. *Rasso*, col. 2, ll. 5-8. Admittedly, the driving point is capable of being inserted into a drilled hole in a pole deck (or any other hole) if the hole has a large enough diameter. However, if the driving point were inserted into a drilled hole, the widened tapered chisel point described by Rasso would cause the pole to rest unstably in the hole. Regardless of the diameter of the hole, a drilled hole will have a constant diameter. On the other hand, the driving point does not have a constant diameter. Thus, if the driving point were inserted into any drilled hole, it would be unstable because the taper of the driving tip would cause the driving point to lean.

As noted in Appellant's specification, in an effort to make holes less noticeable when a pool is used without a fence, designs were developed to have smaller diameter steel pins mounted at a lower end of the fence pole so that smaller holes could be placed in a pool decking. *Specification*, p. 1, ll. 30-33. Such pins have up to now not been used at the gate structure for pool fences because of a perceived need to provide a more stable, rigid structure at and near the gate. *Id.* at ll. 33-35. However, the present invention claims pins for a gate pole, the pins being adapted to be inserted into the drilled sockets in a pool deck, allowing a stable, rigid gate for the pool fence. The claim language used is specifically directed and limited to pins that will be closely secured in a drilled socket in a pool deck and deliberately excludes any other pins that are merely capable of being inserted into such socket.

The Examiner also argues that "[u]se of the pole with a gate or insertion of the pin into a drilled socket in a pool deck are strictly intended use [sic, uses] within the claim and are not positive [sic, positively] claimed limitations. *Answer*, p. 13. Appellant respectfully disagrees. With respect to the claim preamble, courts have noted, "[i]f the claim preamble, when read in the context of the entire claim, recites limitations of the claim, or, if the claim preamble is 'necessary to give life, meaning, and vitality' to the claim, then the claim preamble should be construed as if in the balance of the claim." *Pitney Bowes, Inc. v. Hewlett-Packard Co.*, 182 F.3d 1298, 1305 (Fed. Cir. 1999). For example, a preamble reciting "An abrasive article" was deemed essential to point out the invention defined by claims to an article comprising abrasive grains and a hardened

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binder. *Kropa v. Robie and Mahlman*, 88 U.S.P.Q. 478, 481 (C.C.P.A. 1951). The court noted that "Every union of substance capable *inter alia* of use as abrasive grains and a binder is not an 'abrasive article.'" *Id.* Therefore, the preamble served to further define the structure of the article produced, and thus, limited the claim.

Analogously, in the present case, the claimed gate pole comprises a lower end, an insert received within the lower end, and a pin fixedly attached to the insert. There are many poles which could include such components, but the claim preamble gives "life, meaning and vitality" to the article by specifying that it is a gate pole, i.e., a fence pole for use with a gate. Thus, the gate is indeed a positively claimed limitation of claim 18. As such, Rasso also does not anticipate the claimed invention because Rasso does not disclose a gate pole.

With respect to the insertion of the pin into a drilled socket in a pool deck, Appellant points out that insertion of the gate pole into a drilled socket in a pool deck is essential to the invention and is indeed a positively claimed limitation. With reference to the definition of "adapted" above, Appellant argues that insertion of the pin into a drilled socket in a pool deck is not merely an intended use, but it is the specific use to which the pin is adapted, thereby limiting and defining its structure. The limitation breathes life, meaning and vitality into the claim by pointing out the specific use to which the structure of the pin must conform.

Appellant submits that claim 18 is not anticipated by Rasso. Appellant thus requests that the Examiner's rejection of claim 18 be reversed and the claim allowed. Additionally, claims 19, 20 and 25 depend from claim 18 and contain additional limitations. Thus, Appellant submits that claims 19, 20 and 25 are also not anticipated by Rasso. Appellant thus requests that the Examiner's rejection of claims 19, 20 and 25 be reversed and the claims allowed.

B. The Examiner improperly rejected claim 18 as being anticipated by O'Fearn (U.S. Patent No. 4,576,364).

The Examiner rejected independent claim 18 under 35 U.S.C. 102(b) as being anticipated by O'Fearn (U.S. Patent No. 4,576,364). As noted above, claim 18 reads in relevant part (underlining added for emphasis): "wherein the pin is adapted to be inserted into a drilled socket in a pool deck."

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In rejecting claim 18, the Examiner notes that O'Fearn discloses a pole comprising a pin, wherein the pin is capable of being inserted into a drilled socket in a pool deck. *Answer, p. 4, 14* (emphasis added). Appellant reiterates that the claim language reads "wherein the pin is adapted to be inserted into a drilled socket in a pool deck." Appellant maintains that "a pin adapted to" is patentably distinct from "a pin capable of." To avoid repetition, Appellant incorporates by reference the discussion above regarding the difference in meaning between "adapted" and "capable."

Appellant maintains that O'Fearn does not disclose a gate pole wherein the pin is adapted to be inserted into a drilled socket in a pool deck. O'Fearn discloses an upright beach screen having hollow support poles and stakes telescoped within the support poles, the stakes being cut to a sharp point at the lower end. *O'Fearn, col. 2, ll. 24-26*. As noted in O'Fearn, the stake is cut on one end at such an angle as to provide a sharp point for ease of insertion into the sand. *Id. at col. 1, ll. 40-43*. Clearly, the sharp point at the end of the stake is adapted to be inserted into sand or loose soil, and not into a drilled hole. Admittedly, the stake is capable of being inserted into a drilled hole in a pool deck (or any other hole) if the hole has a large enough diameter. However, if the stake were inserted into a drilled hole, the sharp point at the lower end of the stake described by O'Fearn would cause the pole to rest unstably in the hole. Additionally, the stake is clearly not adapted to be inserted into a drilled hole because there would be no reason for the stake to have a sharp point if it were meant to be inserted into a hole that already exists. Moreover, if the stake were repeatedly inserted into a drilled hole in a pool deck, the lower end of the stake coming into recurring contact with the hard surface at the bottom of the drilled hole over time may fracture or blunt the sharp point of the stake, not only defeating the purpose of the invention, but also damaging the sharp point and impeding further use of the wind screen in sand or soil.

As noted in Appellant's specification, in an effort to make holes less noticeable when a pool is used without a fence, designs were developed to have smaller diameter steel pins mounted at a lower end of the fence pole so that smaller holes could be placed in the pool decking. *Specification, p. 1, ll. 30-33*. Such pins have not been used at the gate structure for pool fences because of a perceived need to provide a more stable, rigid structure at and near the

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gate. *Id. at ll. 33-35*. However, the present invention claim pins that have been adapted to be inserted into the drilled sockets in a pool deck, allowing a stable, rigid gate for the pool fence. The claim language used is specifically directed and limited to pins that will be closely secured in a drilled socket in a pool deck and deliberately excludes any other pins that are merely capable of being inserted into such socket.

The Examiner also argues that "[u]se of the pole with a gate or insertion of the pin into a drilled socket in a pool deck are strictly intended use [sic, uses] within the claim and are not positively claimed limitations." *Answer, p. 14*. Appellant respectfully disagrees, and for the reasons stated above, Appellant maintains that the gate and insertion of the pin into a drilled socket are positively claimed limitations. Accordingly, O'Fearna also does not anticipate the claimed invention because O'Fearna does not disclose a gate pole.

Appellant submits that claim 18 is not anticipated by O'Fearna. Appellant thus requests that the Examiner's rejection of claim 18 be reversed and the claim allowed. Additionally, claims 19, 20 and 25 depend from claim 18 and contain additional limitations. Thus, Appellant submits that claims 19, 20 and 25 are also not anticipated by O'Fearna. Appellant thus requests that the Examiner's rejection of claims 19, 20 and 25 be reversed and the claims allowed.

C. The Examiner has failed to identify a legally cognizable motivation to combine the cited references.

In rejecting claim 1 as being unpatentable over Sadinsky et al. (U.S. Patent No. 5,664,769) in view of O'Fearna, the Examiner notes that "Sadinsky et al. fail to disclose a lightweight fence and gate wherein the poles include an insert that is contained within each pole and a pin that is fixedly attached to each insert, the pin protruding from the bottom of the pole." *Answer, p. 16*. The Examiner also notes that "O'Fearna teaches a lightweight fence comprising a plurality of poles 12, the poles including an insert 18 that is contained within each pole and a pin 16 that is fixedly attached . . . to each insert, the pin protruding from the bottom of each pole; wherein the pins are capable of being inserted into a pool deck adjacent to a pool" *Id.* Thus, the Examiner concludes "it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify a lightweight fence and gate as disclosed by

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Sadinsky et al. to have an insert and pin as taught by O'Fearna in order to provide for easy insertion of the poles, while providing for safe and easy transport and storage of the poles." *Id.* Appellant respectfully disagrees.

Other than the conclusory statement that it would have been obvious to combine Sadinsky et al. and O'Fearna to reach the claimed invention, the Examiner does not provide an explanation nor a motivation to combine the lightweight fence and gate of Sadinsky with the upright beach screen of O'Fearna. The approach taken by the Examiner of simply citing different features of the claimed invention from different prior art sources without presenting a credible explanation of the motivation to combine or modify the references has been addressed by the courts:

The mere fact that the prior art may be modified in the manner suggested by the Examiner does not make the modification obvious unless the prior art suggested the desirability of the modification. [The references] failed to suggest any motivation for, or desirability of, the change espoused by the Examiner and endorsed by the Board. . . . [Rather,] the Examiner relied upon hindsight to arrive at the determination of obviousness. It is impermissible to use the claimed invention as an instruction manual or "template" to piece together the teachings of the prior art so that the claimed invention is rendered obvious. This court has previously stated that "[o]ne cannot use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention."

In re Fritch, 23 U.S.P.Q.2d 1780, 1783-84 (Fed. Cir. 1992) (footnotes omitted, and quoting *In re Fine*, 5 U.S.P.Q.2d 1596, 1600 (Fed. Cir. 1988)).

In the present case, there is no motivation to combine the lightweight fence and gate of Sadinsky et al. with the portable beach wind screen of O'Fearna. As repeatedly stated in O'Fearna, the stakes of the wind screen are used in a completely different manner than the pins of the presently claimed invention. O'Fearna teaches: that the sharp point at the end of the stake is

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provided "for ease of insertion into the sand" (*O'Fearna*, col. 1, ll. 40-43); "when the stake is hollow, as in the preferred embodiment shown, it is easy to stick the stakes into the ground where there is sand or loose soil" (*O'Fearna*, col. 3, ll. 41-44); and "[t]he poles, which are rigid, are of sufficient length to have a protruding end that can be pushed into the ground (soil or sand) to stand the screen upright" (*O'Fearna*, col. 1, ll. 15-18). Clearly the sharp point of the stake taught by *O'Fearna* is adapted to be inserted into a solid, yet manipulatable surface, such as sand or loose soil, and will be maintained upright by the hole created by the stake. *O'Fearna* does not teach or suggest inserting the stakes into any drilled holes in sand or soil, much less a drilled hole in a pool deck. In fact, the sharp tip of the stakes disclosed by *O'Fearna*, if inserted into a drilled hole in a pool deck, would likely fracture or become blunted in addition to not being stably maintained. Rather than finding a motivation or desire to combine two references, it appears that the Examiner has simply located a reference disclosing poles having a telescoping extension and, by combining that reference with the lightweight fence and gate of *Sadinsky et al.*, arrived at the claimed invention using hindsight. Because the stakes disclosed by *O'Fearna* do not serve the purpose of the pins of the presently claimed invention, there could be no motivation nor any desirability to combine the stakes of *O'Fearna* with the lightweight fence and gate of *Sadinsky et al.* and arrive at the claimed invention.

Accordingly, Appellant submits that claim 1 is patentable over *Sadinsky et al.* in view of *O'Fearna*. Appellant thus requests that the Examiner's rejection of claim 1 be reversed and the claim allowed. Additionally, claims 2-17 and 24 depend from claim 1 and contain additional limitations. Thus, Appellant submits that claims 2-17 and 24 are also patentable over *Sadinsky et al.* in view of *O'Fearna*. Appellant thus requests that the Examiner's rejection of claims 2-17 and 24 be reversed and the claims allowed.

D. Conclusion

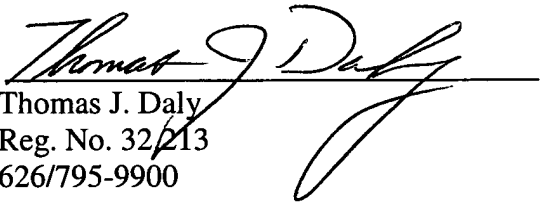
The claimed gate pole of the present invention includes pins that are adapted to be inserted into a drilled hole in a pool deck. Since the pins are specifically designed to fit into these drilled holes, the claims are not anticipated by a structure (i.e., a widened tapered chisel point as taught by *Rasso* or a sharp stake as taught by *O'Fearna*) that is merely capable of being

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inserted into such a drilled hole. Additionally, since the gate and the insertion of the pins into a drilled hole limitations are necessary to give "life, meaning and vitality" to the claim, they are positively claimed limitations, not merely intended uses. Finally, because there is no motivation or desirability to combine the sharp stakes of O'Fearna with the lightweight fence and gate of Sadinsky and arrive at the claimed invention, the claimed invention is patentable over Sadinsky in view of O'Fearna. For at least these reasons, claims 1-20, 24 and 25 are allowable over the prior art, and the Examiner's rejection of those claims should be reversed.

Respectfully submitted,

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Appendix A

1. A lightweight fence and gate for swimming pools surrounded by a deck comprising a plurality of poles, the poles including an insert that is contained within each pole and a pin that is fixedly attached to each insert, the pin protruding from the bottom of each pole;

a mesh screen tensioned between the poles having top and bottom bindings;

a gate in the fence including a frame having a pair of spaced upright support members, a first horizontal brace for spacing the upright support members and a length of mesh screen tensioned between the upright support members;

support means capable of withstanding lateral tension forces of the screen for supporting and latching the gate;

hinges secured to the support means on one side of the gate; and

a latch device secured to the gate and to the support means on the opposite side of the gate;

wherein the pins are adapted to be inserted into the pool deck adjacent to the pool; and

wherein the pool deck has a plurality of sockets, each socket adapted to receive one pin.

2. A lightweight fence and gate as claimed in claim 1 wherein the insert is made of plastic.

3. A lightweight fence and gate as claimed in claim 1 wherein the pin is made of metal.

4. A lightweight fence and gate as claimed in claim 1 wherein the support means includes on each side of the gate a pair of poles inserted into the pool deck with cross members attached to both of the pair of poles.

5. A lightweight fence and gate as claimed in claim 4 wherein the gate includes a generally U-shaped frame opening upwardly with the first horizontal brace secured to the lower ends of the upright support members and a second horizontal brace secured to the upright

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support members on the pool side of the mesh screen at a height well below the top of the gate fabric.

6. The fence and gate according to claim 1 wherein the insert is polyvinylchloride.
7. The fence and gate according to claim 1 wherein the pin is stainless steel.
8. The fence and gate according to claim 1 wherein the support means includes on each side of the gate a pair of poles having a plastic insert contained within each pole and a metal pin that is attached to each insert, the pin protruding from the bottom of each pole, wherein the pins are inserted into the pool deck and wherein cross members are attached to both poles.
9. The fence according to claim 8 wherein the pin is attached to the plastic insert by an adhesive.
10. A lightweight fence and gate for swimming pools surrounded by a deck comprising a plurality of poles, the poles including an insert that is contained within each pole and a pin that is attached to each insert, the pin protruding from the bottom of each pole;
a first length of mesh screen tensioned between the poles defining the pool fence;
a gate in the fence including a frame having a pair of spaced upright support members and a second length of mesh screen tensioned between the upright support members of the gate;
and
support means to which the first length of mesh screen is attached for supporting the fence and gate and latching the gate including a truss structure capable of isolating the lateral tension forces of the first length of mesh screen on opposite sides of the gate;
wherein the pins are adapted to be inserted into the deck adjacent to the pool; and
wherein the pool deck has a plurality of sockets, each socket adapted to receive a pin.
11. A lightweight fence and gate as claimed in claim 10 wherein the inserts of the poles are made of plastic.

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12. A lightweight fence and gate as claimed in claim 10 wherein the pins are made of metal.

13. The fence and gate according to claim 10 wherein the pins are attached to the inserts by an adhesive.

14. A method for installing a self closing gate in a tensioned removable swimming pool fence comprising a plurality of poles, the poles including an insert that is contained within each pole and a pin that is attached to each insert, the pin protruding from the bottom of each pole interconnected by flexible mesh fencing comprising:

inserting the pins protruding from the plurality of poles into a deck surrounding a swimming pool with the flexible mesh fencing in tension to maintain the fence in tension, the deck having drilled sockets adapted to receive the pins;

the first and last poles of the series of poles defining a gate opening;

the first and last poles each constituting a pair of poles interconnected to each other to define a support structure capable of absorbing the tension of the flexible mesh fencing;

fabricating a gate including a pair of side rails, a cross rail and flexible mesh tensioned between the side rails;

hinging the first of the pair of side rails of the gate to the first of the pair of poles; and installing a latch between the second of the pair of side rails of the gate and the last pole of the tensioned fence;

whereby the gate is free to open and close without interference by the tension of the mesh of the fencing.

15. The method in accordance with claim 14 wherein the insert is made of plastic.

16. The method in accordance with claim 14 wherein the pin is made of metal.

17. The method in accordance with claim 14 wherein the pin is attached to the insert with an adhesive.

18. A gate pole comprising:

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a lower end;

an insert that is received within the lower end of the fence pole; and

a pin that is fixedly attached to the insert, the pin having a diameter smaller than that on the pole and a portion that protrudes from the lower end of the fence pole;

wherein the pin is adapted to be inserted into a drilled socket in a pool deck.

19. The gate pole according to claim 18 wherein the insert is made of plastic.

20. The gate pole according to claim 18 wherein the pin is made of metal.

24. The fence and gate according to claim 1, wherein the pin is fixedly attached to the insert by an adhesive.

25. The gate pole according to claim 18, wherein the pin is fixedly attached to the insert by an adhesive.

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a·dapt **Pronunciation Key** (ə-dăpt')

v. a·dapt·ed, a·dapt·ing, a·daps

v. tr.

To make suitable to or fit for a specific use or situation.

v. intr.

 To become adapted: *a species that has adapted well to winter climes.*

 [Middle English adapten, from Latin adaptāre: ad-, *ad-* + aptāre, *to fit* (from aptus, *fitting*. See **apt**).]

a·dapt'ed·ness *n.*
Synonyms: *adapt, accommodate, adjust, conform, fit, 'reconcile*

 These verbs mean to make suitable to or consistent with a particular situation or use: *adapted*

themselves to city life; can't accommodate myself to the new requirements; adjusting their behavior to the rules; conforming her life to accord with her moral principles; fitting the punishment to the crime; couldn't reconcile his reassuring words with his hostile actions.

Antonyms: *unfit*

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adapted

adj : changed in order to improve or made more fit for a particular purpose; "seeds precisely adapted to the area"; "instructions altered to suit the children's different ages" [syn: altered]

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ca·pa·ble   **Pronunciation Key** (kəˈpə-bəl)
adj.

1. Having capacity or ability; efficient and able: *a capable administrator.*
2. Having the ability required for a specific task or accomplishment; qualified: *capable of winning.*
3. Having the inclination or disposition: *capable of violence.*
4. Permitting an action to be performed: *an error capable of remedy; a camera capable of being used underwater.*

[Late Latin capābilis, from capere, *to take*. See kap- in Indo-European Roots.]

ca'pa·ble·ness *n.*

ca'pa·bly *adv.*

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capable

adj 1: (usually followed by `of') having capacity or ability; "capable of winning"; "capable of hard work"; "capable of walking on two feet" [ant: incapable] 2: possibly accepting or permitting; "a passage capable of misinterpretation"; "open to interpretation"; "an issue open to question"; "the time is fixed by the director and players and therefore subject to much variation" [syn: open, subject] 3: (followed by `of') having the temperament or inclination for; "no one believed her capable of murder" [ant: incapable] 4: having the requisite qualities for; "equal to the task"; "the work isn't up to the standard I require" [syn: adequate to(p), equal to(p), up to(p)] 5: have the skills and qualifications to do things well; "able teachers"; "a capable administrator"; "children as young as 14 can be extremely capable and dependable" [syn: able]

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